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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSICA ANN ELLSWORTH,

Defendant and Appellant.

C057619

(Super. Ct. No. 06F063B)

A jury convicted defendant Jessica Ann Ellsworth of first degree burglary (Pen. Code, § 459), criminal threats (Pen. Code, § 422) and misdemeanor battery (Pen. Code, § 242).¹ The court suspended imposition of sentence and granted probation.

Defendant appeals. She contends insufficient evidence supports her convictions for criminal threats and burglary. We reject defendant's contentions and will affirm the judgment.

¹ The same jury convicted codefendant Thomas Stanley Lilly of the same offenses except for the misdemeanor offense. We consider his appeal in case No. C057840.

FACTS

Viewed in the light most favorable to the judgment, we determine whether the entire record "'contains evidence that is reasonable, credible and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 553.)

When defendant, her boyfriend Thomas Lilly, and their three children had no place to stay in early 2006, Jodi P.² allowed all of them to stay overnight in her home that she already shared with her two children. The overnight stay stretched into more than a month, during which time Jodi's two children moved out to stay in their grandparents' home. Defendant and Lilly apparently paid nothing for Jodi's kindness but may have done a few chores around Jodi's house, mostly related to the care of their own children.

Having known defendant and Lilly for many years, Jodi decided to sell a van to Lilly for \$500, with installments of \$100 to begin the first of the month following their agreement. Concerned about liability, Jodi did not want the van driven until the registration had been changed.

About a month after defendant's family had moved in, Jodi returned home one evening to find an unwelcome guest (Eric Doty). Jodi told Doty to leave. Lilly became upset and an

² We use the first names of the victim and witnesses to protect their privacy.

argument ensued. Jodi told Lilly to leave as well. Lilly did so as did defendant and the children. When they left, they took Jodi's van despite Jodi's order not to. They had paid nothing on it and the registration had not been changed.

Jodi told a friend and her father about what had happened and that she wanted to get the van back. Jodi's friend repossessed the van.

On the morning of February 17, 2006, defendant and Lilly went to Jodi's home. Jodi was home using her computer in the living room. Defendant kicked in the locked front door, walked quickly inside, called Jodi a "fucking bitch" and other names for taking the van, and threw punches at Jodi, with a deflected punch landing on the side of Jodi's head. Jodi pushed defendant to the ground before she could land any more punches. Lilly came in the house behind defendant, screaming at Jodi about the van; he threatened to kill her and told her that she should have someone with her at all times. Jodi tried to calmly talk to the two of them, claiming she knew nothing about the van being repossessed. Defendant and Lilly called her a "fucking liar" and a "piece of shit." Jodi defended herself and yelled at them to leave. At one point, Jodi said she was going to call the police. As Lilly left, he threw a punch toward Jodi but stopped just in front of Jodi's face. Outside the house, Lilly picked up a cinder block and started to throw it at Jodi. Jodi stepped inside the door and Lilly dropped the block, stating, "[O]ne of these nights, you are not going to know when, Jodi, but I'm going to come and I'm going to burn your house down with you and

your kids in it." Defendant stood close to Lilly when he said this. Lilly also threatened to shoot and burn Jodi's car, which had belonged to her husband, who had recently committed suicide in the car. Lilly was laughing "very psychotic[ally]." Jodi believed Lilly would carry out his threats and was worried.

After defendant and Lilly left, Jodi called her father, who advised her to call the sheriff's department. Jodi did so and then called her friends to come over and stay with her. Jodi was very fearful; she was afraid to be alone. Because of Lilly's threats, she would not allow her children to stay overnight. Jodi learned that the van had been repossessed by her best friend.

Kathleen A. rented a cabin to defendant and her children while Lilly was in jail. Kathleen claimed defendant admitted kicking in the door of Jodi's home and hitting her in the head. Defendant explained to Kathleen that she (defendant) and Lilly were mad that Jodi had repossessed the van and wanted to know why. When Lilly got out of jail and moved in with defendant, Kathleen asked for the rent, which was due. Lilly became angry and claimed that Kathleen would have to wait. Kathleen evicted the family for nonpayment of rent. Thereafter, Lilly threatened to kill Kathleen and tried to run her off the road.

Defendant testified. She denied kicking down the door and hitting Jodi. Defendant denied that Lilly threatened Jodi. Defendant claimed the accusations were completely false and that she and Lilly did not go to Jodi's home on February 17. Defendant claimed that they moved out of Jodi's home when Jodi

made a sexual advance toward defendant.³ Defendant admitted that they took the van despite Jodi's protests. Defendant claimed Jodi drank alcohol heavily and daily, mostly at the local bar.

Defendant's mother testified for the defense. She claimed that Jodi was at the local bar drinking a lot during pool tournaments. She also claimed that she received the pink slip to the van from Lilly and defendant and gave it to Jodi, who never mentioned any threats.

Stacie M. knew both Lilly and Jodi for many years. Stacie claimed that Jodi did not have a reputation for sobriety.

Lilly did not testify.

DISCUSSION

I

Defendant contends the evidence was insufficient to support her conviction for criminal threats in that there is insufficient evidence that she "aided and abetted" Lilly in threatening Jodi. Defendant does not otherwise challenge the evidence. We conclude that sufficient evidence supports her conviction.

The elements of the offense of criminal threats are as follows: "(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,"

³ Jodi denied this.

(3) that the threat [. . .] was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances. [Citation.]" (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605, italics omitted.)

As previously stated, defendant does not challenge the evidence insofar as it demonstrates that Lilly committed the offense of criminal threats. Defendant challenges only the evidence insofar as it demonstrates that she aided and abetted Lilly in threatening Jodi. Defendant admits that "[t]here is evidence, from [Jodi's] statements, that codefendant Lilly threatened [Jodi] in [defendant's] presence." Defendant argues that there is "no evidence that [defendant] joined in threatening [Jodi]." She claims Lilly's statements were made "on the doorstep, as [defendant] was trying to leave" and there was no evidence that defendant "even heard the threats" or "endorsed them" even if she heard them. Because there is no evidence that she was aware of Lilly's intent or that she encouraged or facilitated him in the crime of criminal threats, defendant argues that her conviction for criminal threats must be reversed.

To aid and abet the commission of a crime, a person must act with "(1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) A person's mere presence at the scene of a crime or his or her mere failure to prevent a crime does not make the person guilty of aiding and abetting. However, these circumstances, as well as the person's companionship with the perpetrator and the person's conduct before and after the offense, are facts for a jury to consider. (*People v. Durham* (1969) 70 Cal.2d 171, 181; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

Defendant was not merely present at the scene of the crime. Lilly made the threats against Jodi during a course of conduct defendant initiated by kicking in Jodi's door. Defendant was no innocent bystander. Some time earlier, defendant and Lilly had taken the van for which they had not paid as they had agreed. Lilly and defendant were angry that Jodi had repossessed the van. After kicking in the front door, defendant called Jodi names for taking the van and took swings at Jodi, hitting Jodi in the head. Lilly followed right behind defendant. He screamed at Jodi about the van, called her names and threatened to kill her. He also took a swing at Jodi, but stopped short of her face. As defendant and Lilly left, Lilly picked up a cinder block to throw at Jodi but dropped it. He then uttered the

threat to burn her house down with her and her children in it. According to Jodi, defendant was standing close by Lilly when he made the threat. Defendant did not tell Lilly to tell Jodi he was not serious, nor did defendant disavow Lilly's threat. Lilly also threatened to burn up a car that had belonged to Jodi's recently deceased husband. Defendant and Lilly left together. The jury could reasonably conclude that defendant and Lilly were acting in concert and shared each other's criminal intent and that defendant aided and abetted Lilly's threats. Substantial evidence supports defendant's conviction for criminal threats.

II

Defendant contends insufficient evidence supports her conviction for first degree burglary. Although conceding there was evidence of forced entry, she contends there was no evidence that she or Lilly intended to commit a felony inside Jodi's house. She concedes there is evidence she intended to commit misdemeanor battery but no evidence that she intended to inflict great bodily injury, which would have made the offense a felony assault. She further contends that there is no evidence that either she or Lilly entered Jodi's home with the intent to steal or threaten Jodi. We conclude that sufficient evidence supports defendant's conviction for burglary.

To prove the offense of burglary, the trial court instructed the jury that the prosecution was required to prove that a person entered a building and at the time of the entry, the person had the specific intent to steal and take someone's

property permanently or the specific intent to commit the crime of assault with intent to commit great bodily injury or to commit the crime of criminal threats. The prosecution proceeded on the theory that defendant and Lilly had the specific intent to commit felony assault or make criminal threats. The court instructed that the jury was not required to agree as to which crime "the defendant intended to commit when he or she entered." The court further instructed on aiding and abetting.

Defendant does not challenge the evidence that she entered Jodi's home. Defendant concedes there was evidence of forced entry, so we will not discuss the element of entry. The intent may be inferred from all the facts and circumstances, including a forced entry. (*People v. Carter* (2005) 36 Cal.4th 1114, 1157; *People v. Matson* (1974) 13 Cal.3d 35, 41; *People v. Osegueda* (1984) 163 Cal.App.3d Supp. 25, 29-30; *People v. Martin* (1969) 275 Cal.App.2d 334, 339.)

Defendant contends that since she did not complete the target offense of felony assault and did not cause great bodily injury, "there is no basis for inferring that she intended to do so." That defendant did not succeed in inflicting serious injuries to Jodi to elevate defendant's misdemeanor conviction for battery to felony assault is of no moment--"whether the victim in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) As the trial court instructed the jury, "[i]t does not matter whether the intent with which the entry was made was thereafter carried out." Defendant went in swinging, landed a punch but was pushed to the

ground by Jodi before defendant could land any more punches. The jury was instructed on assault by means of force likely to produce great bodily injury. The use of hands or fists may support a conviction of assault by means of force likely to produce great bodily injury. (*Aguilar, supra*, at p. 1028; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087.)

Defendant and Lilly went to Jodi's home to find out why she had repossessed the van. Defendant had confided to Kathleen that she (defendant) and Lilly had gone to Jodi's house because they were mad that Jodi had repossessed the van and wanted to know why. Defendant kicked in the locked front door of Jodi's home and entered, throwing punches at Jodi, with Lilly right behind her. Defendant landed a deflected punch on Jodi's head; Jodi defended herself. Lilly also threw a punch but stopped right in front of Jodi's face. Both yelled obscenities at Jodi and screamed at her for taking the van. Outside the house, Lilly threatened to burn Jodi's house down and to shoot and burn her deceased husband's car. The jury could reasonably conclude that defendant and Lilly were acting in concert, aiding and abetting the other, and when they entered, they (a) intended to assault Jodi and inflict great bodily injury since they were mad that she had repossessed the van and they may have continued the assault had Jodi admitted she had known the van had been repossessed and/or had Jodi not defended herself, or (b) intended to criminally threaten Jodi because she had repossessed the van and/or to regain possession of the van since they had previously taken it without paying for it.

Sufficient evidence supports defendant's conviction for burglary.

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

SIMS, Acting P. J.

HULL, J.